

ST 00-0006-GIL 01/14/2000 CERTIFICATE OF REGISTRATION

The Department authorizes wholesalers whose products are sold at retail by numerous distributors to assume responsibility for accounting and paying to the Department all tax accruing under the Retailers' Occupation Tax Act with respect to such sales. See, 86 Ill. Adm. Code 130.550. (This is a GIL.)

January 14, 2000

Dear Xxxxx:

This letter is in response to your letter dated November 24, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See, 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

Per our recent conversation, I have enclosed a copy of a letter along with our standard agreement that was sent to PERSON on November 11, 1997. At our client's request, we would like you to review our standard agreement that would allow my client to collect and remit Illinois sales and use tax on behalf of its independent distributors. If possible, we would like to use this agreement in place of the State's standard agency agreement.

We have reviewed the "Terms to Voluntary Sales Tax Collection Agreement ("Agreement") which was attached to your letter. As a result of our review, we cannot consent to the use of this Agreement in lieu of the Department's standard "Agency Agreement". The Department's regulation governing agency agreements is found at 86 Ill. Adm. Code 130.550, enclosed. Before an agency agreement can be utilized, it must be "acceptable to the Department". Agency agreements allow companies to remit Retailers' Occupation Tax on behalf of participating distributors. Companies remit tax on their sales to distributors, based upon their suggested retail price of the items sold by their distributors. When companies enter into Agency Agreements with the Department, they become retailers subject to Retailers' Occupation Tax, and are the entities to which the Department will look for payment of the tax. We have reviewed your Agreement and have the following comments.

The last paragraph of Section 1(c) of the Agreement states that if the tax base, in the aggregate for a calendar year period is less than that computed based on the suggested retail price, the company may, at its election, be entitled to take a net adjustment to its tax base on a single return to reflect the difference. The Department cannot consent to this provision. Any adjustments made must be effected through the filing of amended returns, which must be amended for each taxable filing period (generally, monthly returns).

Section 1(e) governs the application of local taxes. It states that in most cases, the product is shipped to a distributor's permanent address, and that the local tax rate will be determined by the rate controlling at the distributor's permanent address at the time of sale. Although in practice this provision may result in the correct application of local tax rates, the determination of local tax rates must be made in accordance with the provisions of 86 Ill. Adm. Code 270.115, enclosed.

Section 1(g) states that the company will notify all distributors of the existence of the Agreement, and will inform them that "they shall be deemed to have agreed to permit the Company to act as their collection agent under the terms of this Agreement." The Department's regulation governing Agency Agreements provides, in pertinent part, that retailers affected by Agency Agreements may make written objection to the Department to such agreements and may "opt out" of participation. While the company's distributors may all agree to participate, we wanted you to be aware of these provisions.

Section 2(b) of the Agreement states that the distributors shall have no obligation to independently register with the State for purposes of making sales of product purchased for resale from the company within Illinois. While this may be true for sales tax purposes, we cannot agree that it is true for any other types of registration with the State. This ruling is limited to the application of the Agreement vis-à-vis Retailers' Occupation Tax and Use Tax. In addition, as indicated below, even if distributors may make all purchases for resale, it may be necessary for them to register for the purpose of obtaining a resale number, which will allow them to provide Certificates of Resale to the Company.

This section goes on to state that "[s]ince the distributors will not have an obligation to independently register, the Company shall not have to obtain a resale certificate from its Distributors." If the company makes no retail sales, it is not required to obtain resale certificates from its customers. However, if it does make retail sales, it will be required to obtain Certificates of Resale on its sales to all customers, including distributors, in order to document the resale exemption. The liability of distributors to independently register does not impact the obligation or lack thereof on the company's part to obtain Certificates of Resale. See, Dearborn Wholesale Grocers, Inc. v. Whittler, 82 Ill.2d 471 (2980).

The last paragraph of this section states that the Department "agrees not to file actions against any Distributors who were not previously registered with the Department nor seek a listing of Distributors." We are unable to consent to these provisions. Liabilities of distributors prior to their participation in the Agreement will be determined in accordance with applicable provisions of the Retailers' Occupation Tax and Use Tax Acts.

Section 2(e) of the Agreement states that to the extent that in the aggregate during a calendar year period distributors certify to the company an amount for returned merchandise, the company, "at its election, shall be entitled to make a net adjustment to its tax base on a single return to reflect this difference in tax base." Returned merchandise adjustments for an entire calendar year cannot be made on a single return. Section 3 of the Retailers' Occupation Tax Act provides that "[r]efunds made by the seller during the preceding return period...shall be allowed as a deduction under subdivision 5 of his monthly or quarterly return, as the case may be, in case the seller had theretofore included the receipts from the sale of such tangible personal property in a return filed by him and had paid the tax imposed by this Act with respect to such receipts."

Section 2(f) states that the Department agrees "to act as a third party arbitrator in determining the appropriate local tax rate as discussed in Section 1(e) of this agreement in cases where there is a dispute between the Company and its Distributors." The Department will not become involved in

disputes between the distributors and the company. However, it will provide assistance, as it does to all taxpayers, in response to requests to determine the appropriate local tax rate applicable to any specific transaction.

Section 2(h) states that the Department will allow the company and its distributors a credit "for any state and local taxes properly paid to another jurisdiction or on exempt sales." The provisions of Section 6 of the Retailers' Occupation Tax Act provide that if a retailer who has failed to pay Retailers' Occupation Tax on gross receipts from retail sales is required by the Department to pay such tax, such retailer, "without filing any formal claim with the Department, shall be allowed to take credit against such retailers' occupation tax liability to the extent, if any, to which such retailer has paid an amount equivalent to retailers' occupation tax or has paid use tax in error to his or her vendor or vendors of the same tangible personal property which such retailer bought for resale and did not first use before selling it, and no penalty or interest shall be charged to such retailer on the amount of such credit." Otherwise, if tax was erroneously charged to an exempt purchaser, the retailer must follow the procedures established in Sections 6 through 6a of the Retailers' Occupation Tax Act regarding claims for credit. Please note that no claim may be filed by a vendor unless the vendor unconditionally refunds tax to the person who bore the burden of the tax (in this case, the exempt entity). Unless the company refunds tax to the customer who actually bore the burden of the tax, no claim will be granted.

Section 2(i) governs bad debts and uncollectible accounts. We are unclear whose bad debts are the subject of these provisions. Please be advised, however, that the Department has developed specific procedures to be followed to address bad debts. Generally, bad debts can be taken on the monthly return filed with the Department for the month in which the bad debt is written off on the retailer's Federal income tax return or amended return. If this is not done, a claim for credit can be filed under Section 6 of the Retailers' Occupation Tax Act. For purposes of claims filed under Section 6, an account receivable that becomes a bad debt becomes a "tax paid in error" at the time that the receivable is written off as a bad debt on the retailer's Federal income tax return or amended return. This is the time when the statute of limitations for filing a claim for credit starts to run.

Section 2(j) of the Agreement states that since the "Company is merely acting as a voluntary collection agent, the Company's liability to the State will be limited to all applicable taxes collected by the Company, but not remitted to the State plus any applicable penalties and interest. Primary liability for collection of the tax continues to rest with the Company's distributors, for whom the Company has voluntarily agreed to act as a tax collection agent." The nature of an Agency Agreement is such that companies agree to remit Retailers' Occupation Tax on their sales to distributors based on their suggested retail prices of items sold by distributors. The Department will therefore look to the Company for liability on all sales made to distributors. Primary liability for such sales rests with the Companies, not distributors, in an Agency Agreement.

Section 2(k) states that "the Department agrees that no tax will be imposed upon separately stated shipping charges separately invoiced to a Distributor that purchases product for his or her own personal use." The Department cannot agree to this provision. Shipping charges are governed by the provisions of 86 Ill. Adm. Code 130.415, enclosed. As you can see, while no tax will apply to sales for resale, shipping charges made to end users will be taxed if they are considered part of the selling price of the tangible personal property sold. Whether they are part of the selling price depends

not upon their separate billing, but upon whether the buyer and seller have separately agreed to these charges apart from the selling price of the goods, and whether the charges designed as shipping are actually reflective of shipping costs. To the extent the charges exceed the costs of shipping, they are subject to tax.

Section 2(l) provides that the company administers a credit card program that allows its distributors to accept credit cards from customers. The company charges distributors for this service. The Agreement states that the "Department recognizes that charges for this purely administrative service shall not be subject to the State's Retailer Occupational Tax." Please be advised, however, that if the distributors make charges to their customers in order to pass along the cost of these services, or if these charges are built into the selling price of the items, they cannot be deducted from gross receipts subject to Retailers' Occupation Tax. They represent a retailer's cost of doing business which cannot be deducted. See, 86 Ill. Adm. Code 130.410.

Section 3(c) governs confidentiality. These provisions state that "[n]othing in this Agreement shall be construed to conflict with any federal or state statutes or prevent the Department from responding to requests for information from other taxing jurisdictions with which the State has information-sharing agreements. The Department shall not respond to any such request during the immediate six (6) months following the Effective Date of this Agreement." The Department cannot agree to the 6-month restriction. The provisions of Section 11 of the Retailers' Occupation Tax Act regarding confidentiality are observed with respect to information regarding taxpayers.

I hope that this information is helpful. If you have further questions concerning these matters, please feel free to contact me at the number listed above.

Very truly yours,

Jerilynn T. Gorden  
Senior Counsel, Sales & Excise Tax

JTG  
Enc.